In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 501

DYKE WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California and to the Public Utilities Commission of the State of California

Brief in Opposition

The respondent Public Utilities Commission of the State of California (hereinafter called Commission) respectfully urges that the Petition for a Writ of Certiorari of Dyke Water Company (hereinafter called Dyke) be denied.

ARGUMENT

I. No Federal Question Was Properly Raised in the Supreme Court of the State of California.

The Petition (pp. 2, 4) rests the jurisdiction of this Court upon that part of 28 U.S.C. Section 1257 (62 Stat. 929)

empowers the Court to review final judgments of courts "by writ of certiorari . . . where any title, privilege or immunity is specially set up or claimed the Constitution . . . of the United States."

Petition then cites the "relevant section of the Four Amendment to the United States Constitution" as s:

No state shall make or enforce any law which shall bridge the privileges or immunities of citizens of the nited States; nor shall any state deprive any person f life, liberty or property without due process of law; or deny to any person within its jurisdiction the equal rotection of the laws."

areful scrutiny, however, of all the documents ad- d to the California Supreme Court[1] discloses no nce to the Fourteenth Amendment of the Constitution United States or any other part of that Constitution. are merely scattered allegations, such as that the ission's order constitutes "a confiscation of petition- roperty and fails to provide a fair return to peti- 's investment as required by law"; that it "denied to oner procedural due process of law and an opportunity fair hearing as required by law"; that petitioner will eprived of its property"; that the Commission's order tes a constitutional right of the petitioner"; and that ndings of the Commission that are material to the

[1] These documents are all set out in the Appendix to the Petition and are as follows:
Petitions for Writ of Certiorari or Review, Exhibit D, pp. 24-32;
Memorandum of Points and Authorities in Support of Petition for Writ of Certiorari or Review," Exhibit E, pp. 33-48;
Petitioner's Closing Brief, Exhibit F, pp. 49-66;
Petition of Dyke Water Co. for Rehearing of Decision Filed June 22, 1961, and Memorandum of Points and Authorities in Support Thereof, Exhibit H, pp. 97-106.

determination of the "constitutional question" are not determinative.

As stated in *Orleg State Co. v. Bather Co.*, 166 U.S. 648, 655; 41 L. ed. 1149, 1152: "The jurisdiction of this Court to re-examine the final judgment of a state court can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

This court will not take cognizance of a claim grounded upon mere references to a Constitution or to "due process of law."

Bond v. Scott, 233 U.S. 658, 664, 665; 58 L. ed. 1141, 1145.

"[I]t is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the State, Constitution was relied upon, and that such provision must be set forth."

New York Central and H.R.R. Co. v. New York, 186 U.S. 269, 273; 46 L. ed. 1158, 1160.

If it is merely alleged that a state law is "unconstitutional" or that it denies "constitutional rights," it will be assumed that references being made to the state constitution and rights thereunder rather than to the Federal Constitution.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 68; 73 L. ed. 184, 187.

If the state constitution has a due process clause, a claim that "due process" has been violated will be deemed to relate to that clause.

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[2] These allegations are to be found on the following pages in the Appendix to the instant Petition:

Pages 27, 28, 31, 36, 37, 38, 40, 41, 50, 64, 99, 105.

Bowe v. Scott, 233 U.S. 658, 664, 665; 58 L. Ed. 1141, 1145.

The Constitution of the State of California, Article I, Section 13, contains a "due process" clause, which is in material part as follows:

> "No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; . . ."

The California Supreme Court apparently did not believe that any question of a violation of the Constitution of the United States had been raised before it, there being no reference whatever to that Constitution in its Opinion (set out as Exhibit G, pp. 67-96 in the Appendix to the instant Petition).

Elliptical references to constitutional rights are not enough to invoke this Court's jurisdiction.

II. No Substantial Federal Question Is Presented by the Petition.

Even if it should be concluded that the Petitioner intended to and did properly raise in the California Supreme Court a question of a violation of its rights under the Fourteenth Amendment of the Constitution of the United States, nevertheless there is not sufficient substance in such a question to warrant this Court's attention.

The petition alleges violations of due process in both its substantive and procedural aspects. There is no merit in either contention.

A. SUBSTANTIVE DUE PROCESS.

(1) The Rate Order Was Not Confiscatory.

The opinion of the California Supreme Court refers to the evidence before the Commission that "Petitioner would earn for the year 1959 a return of 16.08%" under the chal-

lenged rates; to the evidence that the rates sought by petitioner in its application to the Commission would yield 31.48%; to the evidence of other high rates of return on other bases; and to the Commission's conclusion, together with the assumptions underlying such conclusion, that petitioner would earn a return of approximately 7% in 1960 and subsequent years (Petition, Appendix, pp. 85, 86, 90, 91).

The California Court's opinion also explains, in the light of the record, why such high rates of return were likely (Petition, Appendix, pp. 86-88). This explanation, briefly expressed, is that the Commission as a matter of policy, for rate-fixing purposes, does not recognize, and in this case did not recognize, as a part of rate base, plant constructed with interest free moneys advanced to the utility by real estate developers for extensions of the utility's water service into new subdivisions. The result is that Dyke's net income yields a high return on a small rate base. This policy was approved by the California Supreme Court (Petition, Appendix, p. 88).

The petition cites the case of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602; 88 L. ed. 333 and says that the California Court's decision affirming the Commission's order "illustrates a complete disregard of the rationale of that and the other decisions of this Court"; and that the California Supreme Court "ignored the clear import of the many cases decided by this Court: that whatever the theory utilized by the agency setting the utility's rates, the end result must be just and reasonable." (Petition, p. 7)

But petitioner does not specify any grounds for its charge that the end result here was not just and reasonable, and no reason appears why Dyke's ratepayers should pay rates

to produce a return on money with respect to which Dyke has no obligation to pay interest or dividends.

The petition says that "The strongest evidence of the confiscatory nature" of the Commission's order is the "fact" that a local municipality had offered and petitioner had accepted the sum of approximately $7,000,000 for its system, coupled with the fact that Dyke's rates were reduced to the level prevailing in 1952 (Petition, p. 8).

But there is no evidence whatever in the record of any such price. Nor can it be made a part of the record by saying "It was never disputed". Nor is there any probative force in the fact that the Commission reduced Dyke's rates to their 1952 level.

(2) The Commission's Order with Respect to Metering Was Neither Confiscatory, Unreasonable, Nor Beyond Its Jurisdiction.

The opinion of the California Supreme Court describes the long history lying behind the Commission's order that Dyke install meters (Petition, Appendix, pp. 75-84). This history shows that for a long time there has been an urgent need for metering water in the Southern California area, in which Dyke serves, in order to prevent waste and discrimination; that in 1957 when seeking, on other grounds, review by the California Supreme Court of a prior Commission decision in which it was ordered that meters be installed on its system, Dyke did not question such order; that Dyke's own witness testified that meters are essential; that when Dyke was seeking a rate increase, its own president testified that a program of meter installation was feasible and would not impose any undue financial burden upon Dyke; that Dyke sent to the Commission periodic progress reports with respect to its metering program; and that after rate relief was granted by the Commission, Dyke renounced the metering program. The evidence shows that

Dyke's conduct with respect to metering has been marked by dilatoriness and bad faith.

As the California Supreme Court said, "At this late date, petitioner is hardly in a position to complain that the Commission's order on March 22, 1960, is impossible or unreasonable." (Petition, Appendix, p. 36)

Presumably this Court is not concerned with whether or not the Commission's meter order was within its jurisdiction, there being no federal question involved.

In any event, the California Supreme Court concluded that such an order was within the Commission's jurisdiction under California law (Petition, Appendix, pp. 30-34).

B. PROCEDURAL DUE PROCESS.

(1) The Commission's Denial of Dyke's Petition for Rehearing Violated No Right of Petitioner Under the Constitution of the United States.

Dyke complains that it should have been afforded an opportunity upon rehearing to present evidence of its actual operating expenses and revenues for the years 1958 and 1959, which it says "was unavailable at the time of the hearings" (Petition, p. 6).

In truth, Dyke itself presented evidence of its actual operating expenses and revenues for 1958 (See Petition, Appendix, p. 116).

There was no duty on the Commission to grant rehearing to hear evidence pertaining to 1959 operations occurring after the record was closed.

Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514, *et seq.*; 88 L. Ed. 1420.

(2) The Commission's Rejection of the Examiner's Conclusions After Adopting Certain of His Findings Violated No Right of Petitioner Under the Constitution of the United States.

The petitioner does not demonstrate how any of its constitutional rights were infringed by the Commission's

adopting certain of the Examiner's findings but rejecting his conclusions and reaching different ones.

Even if it should be assumed that such a fact raised a federal question, such a question has been settled by this Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 492; 95 L. ed. 456, 470, and *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 358, 364; 99 L. ed. 1147, 1154.

These and other cases are commented upon in Davis, Administrative Law Treatise, Volume II, Section 10.04.

These cases make it clear that this Court recognizes the right of administrative agencies to reach results differing from those of their hearing officers, provided those results are supported by substantial evidence in the record, including the Examiner's report. There was substantial evidence here that Dyke would earn a return approximating 7% as determined by conventional methods of rate making.

(3) The Commission's Denial of Dyke's Request for Oral Argument Violated No Right Under the Constitution of the United States.

After the Examiner's proposed report was filed, the petitioner availed itself of its right under the Commission's Rules of Procedure to file exceptions thereto, and a reply to exceptions filed by others.

"Argument may be oral or written. The requirements are not technical."

Morgan v. United States, 298 U.S. 468, 481; 80 L. ed. 1288.

To the same effect is *Federal Communications Commission v. Station WJR*, 337 U.S. 265, 275; 93 L. ed. 1353.

Proposed reports and allowing of the filing of exceptions thereto have been referred to by this Court as "good practice".

Morgan v. United States, 304 U.S. 1, 21; 82 L. ed. 1129, 1134.

III. Conclusion.

The petition for a writ of certiorari should be denied for the reasons:

(1). It did not properly raise any federal question in the California Supreme Court, whose decision is here challenged;

(2). Even if such a question were properly raised in that Court, the petition presents to this Court no substantial question of any violation by the California Supreme Court or by the Commission of any right of petitioner under the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted.

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Dated: November 10, 1961.

IN THE

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OCTOBER TERM 1961

No. 501

DYKE WATER CO.,

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vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION.

In support of its petition for a writ of certiorari, petitioner, Dyke Water Co., submits the following reply or supplemental brief pursuant to the provisions of Rule 24(4).

ARGUMENT.

I.

A Federal Question Was Raised Throughout the Proceedings Below.

A Federal Question was appropriately raised by petitioner at every stage of the proceedings after issuance of the opinion and order of the respondent Commission sought to be reviewed by this court. In the first pleading filed by petitioner following the issuance of Decision No. 49828 of the Public Utilities Commission of the State of California, petitioner expressly alleged

that "The opinion and order [Decision No. 49828, of the respondent Commission] constitutes a violation of the Federal and California State Constitutional guarantees against taking of privately owned property without compensation. . . ." (Ex. "B," p. 13, Petition for Writ of Certiorari) and that the opinion and order of the respondent Commission was arbitrary and capricious and constituted ". . . a violation of Federal and California State Constitutional guarantees of due process of law." (Ex. "B," p. 14, Petition for Writ of Certiorari.) The petition addressed to the California Supreme Court for a writ of certiorari or review (Ex. "D," p. 24, Petition for Writ of Certiorari) expressly incorporated the petition for rehearing before the respondent Commission. (Ex. "D," p. 27, Petition for Writ of Certiorari.) The allegation of the brief in opposition that no Federal Question was raised by petitioner is, therefore, directly controverted by the record before this Court.

II.

Substantial Federal Questions Are Presented by the Petition.

The unexplained refusal of the respondent Commission to follow the recommendations of its own hearing officer raises a substantial Federal Question on which there are conflicts in the reported decisions of the courts of the United States. The brief in opposition attempts to catagorize the issuance by the respondent Commission of an opinion and order contrary to the recommendations of its own hearing officer as a "procedural" question. However, wholly apart from any procedural irregularity, such action by the respondent Commission

raises issues of substantive due process, since one question raised by the petition for writ of certiorari is whether the rates ordered by the respondent Commission are confiscatory and thus constitute a denial of due process of law to petitioner. If the opinion and order of the respondent Commission is unsupported by substantial evidence, its action is arbitrary and capricious and must be reversed by the Courts.

Throughout the proceedings below, petitioner contended that evidence which would otherwise support the opinion and order of the respondent Commission is, as a matter of law, rendered *insubstantial* by the fact that the preponderance of the evidence supports the recommendation of the hearing officer. (Ex. "F," p. 55, Petition for Writ of Certiorari.) The respondent Commission and the court below ignored this contention, and the respondent Commission cites *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474 (1951) and *Federal Communications Commission v. Allentown Broadcasting*, 349 U. S. 358 (1955) as authority for the proposition that an administrative agency is free to adopt a decision contrary to that of its hearing officer regardless of the evidence supporting the hearing officer's determination. However, both cases cited deal with the question of what effect the contrary determination of the hearing officer has on the evidence which would otherwise support the decision of the administrative agency. As stated in *Davis*, Administrative Law Treatise, Vol. 2, page 25, § 10.04, "Several cases since the *Allentown* decision show that the Courts of Appeals are going along with the idea that the agency may reverse the examiner even on questions of credibility. Even so, it is still possible for a reviewing court to

reject an agency's findings and adopt those of the examiner as is shown by In re United Corporation." (See *In re United Corporation*, 249 F. 2d 168, 178 (3rd Cir. 1957).) In the latter class of cases, the courts have followed the express language of the Court in *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786, 789-790 (7th Cir. 1951)

> ". . . it is the duty of this Court to examine the record as a whole, *including the report of the examiner*, in order to determine whether the evidence supporting the Commission's order is substantial . . . *Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.* The findings of the examiner are to be considered . . . The foregoing facts fully establish the examiner's finding . . . and they outweigh the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not as unassailable as a master's [Citation] *where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. Folds v. Federal Trade Commission* (7th Cir., 187 F. 2d 648, 661." (Emphasis added.)

Although an administrative agency has the right to reach conclusions differing from those of its hearing officer, there is substantial conflict among the courts of the United States as to the consequence of a contrary determination by the hearing officer on the ba-

sis of evidence which might otherwise support the administrative agency's action. (Compare *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, *supra*, 191 F. 2d 786 (7th Cir. 1951); *In re United Corporation*, *supra*, 249 F. 2d 168 (3rd Cir. 1957); and *A. E. Staley Mfg. Co. v. National Labor Relations Board*, 117 F. 2d 808 (6th Cir. 1941) with *N. L. R. B. v. Klein Products Co.*, 200 F. 2d 109 (5th Cir. 1953); *Utica Observer Dispatch v. N. L. R. B.*, 229 F. 2d 575 (2nd Cir. 1956); and *Pierce v. S. E. C.*, 239 F. 2d 160 (9th Cir. 1956).)

Conclusion.

The petition for a writ of certiorari raises substantial questions of violations of the rights of petitioner conferred by the 14th Amendment to the Constitution of the United States. The Federal Questions presented are of national significance, and are of vital concern to every public utility regulated and controlled by the respective governments of the several States.

It is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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